

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANK P. MAYFIELD and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-151; Oral Argument Held May 7, 1998;
Issued September 9, 1998*

Appearances: *Joseph R. Livesey, Esq.*, for appellant; *Catherine P. Carter, Esq.*,
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant has met his burden of proof to establish that his bilateral foot condition was caused or aggravated by factors of his federal employment.

This is the second appeal in this case.¹ In its decision issued March 27, 1989, the Board found that this case was not in posture for a decision. The Office had determined that there existed a conflict in the medical opinion evidence between appellant's physician, Dr. Harold W. Vogel, a podiatrist, and Dr. A.L. Fortuna, a podiatrist and Office second opinion physician, regarding whether appellant had any orthopedic conditions caused or aggravated by employment factors. In order to resolve this conflict, the Office referred this case to Dr. Richard M. Jay, a podiatrist and impartial medical specialist, and subsequently based the denial of appellant's claim on Dr. Jay's report. The Board determined, however, that Dr. Jay's May 5, 1988 report required clarification and elaboration, and therefore set aside the August 8, 1988 decision of the Office and remanded the case for further medical development. The facts of this case are more fully set forth in the prior decision of the Board and are incorporated herein by reference.

After remand of the case record, the Office requested that Dr. Jay provide a supplemental medical opinion, as directed by the Board. In this opinion, dated March 10, 1990, Dr. Jay stated

¹ See Docket No. 89-3 (issued March 27, 1989). Briefly, in this case on February 11, 1981, appellant filed a notice of occupational disease for conditions related to his feet. The Office of Workers' Compensation Programs accepted that the following employment-related incidents occurred. On July 21, 1971 while rigging a pump on a tugboat, the chain block slipped and fell on appellant's left foot. On May 26, 1976 appellant dropped a 150-pound electrical box, striking his shin and both feet. Appellant has sought continual treatment since 1976 and has undergone several surgeries. Appellant retired on disability retirement effective October 18, 1979 and was separated from the employing establishment effective January 30, 1980. Appellant's claim is based on his contention that the traumatic employment-related injuries he sustained were the catalyst of his foot problems.

that appellant's foot deformities were due to long-standing arthritic changes and did not appear to be related to his employment incidents. On the basis of this opinion, in a decision dated April 9, 1990, the Office denied appellant's claim for compensation on the grounds that the weight of the medical evidence failed to support a finding that appellant's bilateral foot condition was causally related to his federal employment.

Appellant disagreed with the decision of the Office and requested an oral hearing before an Office hearing representative. In a decision dated May 16, 1991, the hearing representative set aside the Office's April 9, 1990 decision on the grounds that the decision was premature, and remanded the case for the Office to prepare an updated statement of accepted facts and to obtain further clarification from Dr. Jay.

In a report dated September 12, 1991, Dr. Jay opined, in pertinent part, that appellant's employment had neither caused nor aggravated his foot condition.

In a decision dated September 25, 1991, the Office denied appellant's claim on the grounds that the weight of the medical evidence, as represented by the well-reasoned report of Dr. Jay, the impartial medical specialist, was sufficient to establish that appellant's bilateral foot condition was not causally related to factors of his federal employment.

Appellant requested a hearing before an Office representative and submitted a medical report from Dr. Raymond W. Shore, a podiatrist and treating physician, in support of his claim.

In the report dated July 2, 1992, Dr. Shore stated that appellant's employment injuries had caused a major foot deformity which resulted in the development of painful traumatic arthritis, crepitus and chondromalacia, and that appellant's employment activities continued to aggravate his condition.

Appellant also submitted a report dated April 9, 1992 from Dr. Clancy D. McKenzie, a Board-certified psychiatrist, who diagnosed adjustment disorder with anxiety and major depression, and opined that appellant's emotional state was directly related to his injuries, to the pain, to the frustration and aggravation of securing treatment for his condition and to his inability to function as a result of his work-related injuries.

In a decision dated December 8, 1994, the Office hearing representative found that Dr. Shore's July 2, 1992 report was sufficient to create a new conflict in medical opinion with the report of Dr. Jay and to require referral of appellant to a Board-certified podiatrist for an impartial medical opinion. The hearing representative further found that the April 9, 1992 psychiatric report from Dr. McKenzie was sufficient to require the Office to undertake additional medical development, and directed the Office to refer appellant to a Board-certified psychiatrist for a second opinion examination.

On February 8, 1995 the Office referred appellant to Dr. Josephine A. DePalma, a podiatrist, for an impartial medical examination for the purpose of resolving the conflict in medical opinion regarding appellant's foot condition. In her report dated March 3, 1995, Dr. DePalma indicated that she had examined appellant and taken his history, and had reviewed the statement of accepted facts and medical evidence provided by the Office. Dr. DePalma

diagnosed congenital pes planus, left greater than right, heel spur syndrome and plantar fasciitis, and degenerative joint disease secondary to pes planus foot type. Regarding whether appellant's diagnosed conditions were causally related to appellant's work injuries, Dr. DePalma stated, in pertinent part:

"2. ... Again, there is no evidence to substantiate that his current foot complaints and condition can be attributed to his employment or the injuries sustained at work. His foot complaints and condition are a result of his congenital type.... There is no evidence that the trauma he sustained at work could cause or even aggravate a congenital flat foot with its resultant symptomology."

The Office also referred appellant to Dr. Perry A. Berman, a Board-certified psychiatrist, for a second opinion evaluation. In his report dated February 19, 1995, following his examination of appellant and a review of the pertinent medical evidence of file, Dr. Berman diagnosed mild depression, secondary to long-standing unemployment and lack of activity and daily structure, mixed personality disorder with paranoid, avoidant and schizoid characteristics, and long-standing medical/arthritis problems with the feet, which he noted were noninjury related according to numerous foot specialists. Dr. Berman specifically stated that appellant's emotional conditions are related to his not working and that his personality factors are long-standing and unrelated to the injury.

In a decision dated April 10, 1995, the Office denied appellant's claim on the grounds that the weight of the medical evidence failed to establish that appellant suffers from any work-related disabilities.

On May 1, 1995 appellant requested a hearing. At the hearing, held on February 29, 1996, appellant provided additional medical evidence in support of his claim from Drs. McKenzie and Victor Zerkovitz, a podiatrist, each of whom testified at the hearing and provided a written narrative report.

In his testimony and in his report dated February 28, 1996, Dr. Zerkovitz stated that, he had examined appellant several times and had reviewed the relevant medical evidence of file. Dr. Zerkovitz stated that appellant had a flat foot deformity that was aggravated and exacerbated by the two traumatic employment injuries, which transformed appellant's asymptomatic flat foot into a symptomatic flat foot. He added that the traumatic employment incidents also precipitated the development of traumatic arthritis of the foot. He concluded that appellant continued to be disabled due to these employment-related foot conditions.

Appellant's treating psychiatrist, Dr. McKenzie, testified and stated in his report dated February 27, 1996, that he took issue with the opinion expressed by Dr. Berman, the Office second opinion psychiatrist, whom he noted did not have the benefit of a long-standing treating relationship with appellant. Dr. McKenzie reiterated his opinion that the total denial of the obvious by so many doctors working for the government had totally frustrated and aggravated appellant to the point of distraction and that he was seriously affected by this.

In a decision dated June 24, 1996, the Office hearing representative denied appellant's claim for compensation benefits on the grounds that the weight of the medical evidence,

represented by the rationalized opinion of Dr. DePalma, the impartial medical specialist, failed to establish that appellant's foot conditions are causally related to his federal employment. The hearing representative further found that the additional evidence from Dr. Zelkovitz and McKenzie submitted subsequent to Dr. DePalma's report, was insufficient to either shift the balance of the evidence or to create a new conflict in the medical opinion evidence.

The Board finds that appellant failed to meet his burden of proof to establish that his bilateral foot conditions were caused or aggravated by factors of his federal employment.

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."² The opinion of the physician selected by the Office, called an impartial medical examiner or independent medical specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.³

In this case, the Office found a conflict in medical opinion to exist between appellant's attending physician, Dr. Shore, who opined that appellant's bilateral foot condition was causally related to his having been injured in the course of his federal employment and Dr. Jay, the impartial medical specialist who had been designated to resolve an earlier conflict in the case, and who opined that appellant's condition was neither caused nor aggravated by his condition. In order to resolve this conflict, the Office referred appellant, a statement of accepted facts, medical records and a list of specific questions to Dr. DePalma for an impartial medical evaluation pursuant to section 8123(a) of the Act. In a report dated March 3, 1995, Dr. DePalma stated that there was no evidence to substantiate that appellant's current foot complaints and condition could be attributed to his employment or to the injuries sustained at work, but rather that appellant's condition was the result of his congenital foot type. The Board finds that Dr. DePalma's opinion is based on a complete and accurate factual background and is sufficiently well rationalized to be accorded special weight. The report of Dr. DePalma constitutes the weight of the medical evidence and establishes that appellant's foot condition is not causally related to the injuries he sustained in the course of his federal employment.

The reports from Dr. Zelkovitz submitted by appellant following the Office's decision based on Dr. DePalma's report are insufficient to overcome the weight accorded to Dr. DePalma's report or to create a new conflict of medical opinion, insofar as Dr. Zelkovitz's opinion and the rationale given by him are similar to the prior reports of record on one side of the conflict resolved by Dr. DePalma.⁴

Appellant has also failed to establish that he has an emotional condition causally related to his federal employment. As the Board pointed out in the case of *Lillian Cutler*,⁵ "workers'

² 5 U.S.C. § 8123(a).

³ *Gary R. Sieber*, 46 ECAB 215 (1994).

⁴ *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁵ *Lillian Cutler*, 28 ECAB 125 (1976).

compensation law does not apply to each and every illness that is somehow related to an employee's employment." Where an employee experiences emotional stress in carrying out his employment duties or has fear and anxiety regarding his ability to carry out his duties, and the medical evidence establishes that the disability resulted from his emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment. This is true where the employee's disability resulted from the employee's emotional reaction to a special assignment or requirement imposed by the employing establishment or by the nature of his work. On the other hand, there are injuries that have some kind of causal connection with the employment but nevertheless are not covered under workers' compensation because they are not found to have arisen out of employment. The situation presently before the Board falls within the second category. Both the Office second opinion physician, Dr. Berman, and Dr. McKenzie, appellant's treating psychiatrist, opined that appellant's emotional condition is due in large part to anger and frustration regarding the Office's denial of appellant's claim for compensation. However, the manner in which the Office adjudicates a compensation claim, or the denial of a compensation claim, do not constitute compensable employment factors under the Act.⁶ Appellant's physicians also opined that his emotional condition is in part a reaction to his physical pain. However, while an appellant may develop a compensable emotional condition as a result of being in physical pain, as the weight of the medical evidence fails to establish that appellant's bilateral foot condition is causally related to his employment, any emotional condition which might have arisen from appellant's reaction to foot pain is not compensable.⁷

⁶ *Virgil Hilton*, 37 ECAB 806 (1988).

⁷ *Arnold A. Alley*, 44 ECAB 912 (1993).

The decision of the Office of Workers' Compensation Programs dated June 24, 1996 is affirmed.

Dated, Washington, D.C.
September 9, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member